

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11 CECIL STERLING,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE,  
15 Commissioner of Social Security,

16 Defendant.

} No. CV 12-913 AGR

MEMORANDUM OPINION AND ORDER

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18 Plaintiff Cecil Sterling filed a complaint on June 15, 2012. Pursuant to 28 U.S.C.  
19 § 636(c), the parties consented to proceed before the magistrate judge on July 9 and  
20 13, 2012. (Dkt. Nos. 8, 9.) The parties filed a Joint Stipulation (“JS”) on December 31,  
21 2012, that addressed the disputed issues in the case. The Commissioner filed the  
22 certified administrative record (“AR”). The court has taken the Joint Stipulation under  
23 submission without oral argument.

24 Having reviewed the entire file, the court reverses and remands this matter to the  
25 Commissioner for proceedings consistent with this opinion.

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## I.

**PROCEDURAL BACKGROUND**

On April 13, 2009, Sterling filed an application for supplemental security income benefits, alleging an onset date of November 1, 2002.<sup>1</sup> AR 10. The application was denied initially and upon reconsideration. AR 52-53. Sterling requested a hearing before an ALJ. On January 19, 2011, the ALJ conducted a hearing at which Sterling and a vocational expert ("VE") testified. AR 22-51. On January 25, 2011, the ALJ issued a decision denying benefits. AR 7-18. On March 7, 2012, the Appeals Council denied the request for review. AR 1-3.

## II.

**STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner's decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence or it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

In this context, "substantial evidence" means "more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion." *Moncada*, 60 F.3d at 523. When determining whether substantial evidence exists to support the Commissioner's decision, the Court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. Where the evidence is susceptible to more than one rational interpretation, the Court must defer to the decision of the Commissioner. *Moncada*, 60 F.3d at 523.

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<sup>1</sup> Sterling previously filed an application for disability benefits on March 22, 2002. AR 10. The Administrative Law Judge ("ALJ") issued a decision denying benefits on July 23, 2003. AR 10, 54-61. The ALJ found that Sterling's current application alleges new impairments. AR 10.

1                   **III.**  
2**EVALUATION OF DISABILITY**3                   **A.     Disability**

4                   A person qualifies as disabled, and thereby eligible for such benefits, "only if his  
5 physical or mental impairment or impairments are of such severity that he is not only  
6 unable to do his previous work but cannot, considering his age, education, and work  
7 experience, engage in any other kind of substantial gainful work which exists in the  
8 national economy." *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed.  
9 2d 333 (2003).

10                  **B.     ALJ's Findings**

11                  The ALJ found that Sterling has the severe impairments of degenerative disc  
12 disease and spondylosis of the cervical spine, cervical myelopathy, chronic  
13 radiculopathy in multiple nerve roots on the left side, cervical spine stenosis, status post  
14 anterior and posterior cervical spine fusion, headaches, a history of hepatitis C and  
15 substance abuse in reported remission. AR 12. Sterling has the residual functional  
16 capacity ("RFC") to perform light work: Sterling "is able to lift and/or carry 20 pounds  
17 occasionally and 10 pounds frequently. Out of an 8-hour workday, the claimant is able  
18 to stand, walk, and/or sit 6 hours with normal breaks such as every 2 hours and the  
19 ability to stand and stretch every hour for 1 to 3 minutes at a time. The claimant is able  
20 to occasional[ly] stoop and bend and he is able to climb stairs. The claimant cannot  
21 climb ladders, work at heights, or balance. He is able to reach above shoulder level  
22 occasionally and he can do occasional neck motion, but he should avoid extremes of  
23 motion. His head should be held in a comfortable position most of the time. The  
24 claimant is able to perform occasional forceful gripping, grasping, twisting, and turning  
25 with his left non-dominant hand. There is no limitation on his right hand." AR 13.

1       The ALJ found that Sterling is capable of performing past relevant work as a care  
 2 provider, as actually performed.<sup>2</sup> AR 17-18.

3       **C. Past Relevant Work**

4       “At step four of the sequential analysis, the claimant has the burden to prove that  
 5 he cannot perform his prior relevant work ‘either as actually performed or as generally  
 6 performed in the national economy.’” *Carmickle v. Commissioner of the SSA*, 533 F.3d  
 7 1155, 1166 (9th Cir. 2008) (citation omitted). Past relevant work is work that the  
 8 claimant has done within the past 15 years, that was substantial gainful activity, and  
 9 that lasted long enough for the claimant to learn to do it. 20 C.F.R. § 404.1560(b)(1).

10       “Although the burden of proof lies with the claimant at step four, the ALJ still has  
 11 a duty to make the requisite factual findings to support his conclusion.” *Pinto v.*  
 12 *Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). The ALJ must make “specific findings as  
 13 to the claimant’s residual functional capacity, the physical and mental demands of the  
 14 past relevant work, and the relation of the residual functional capacity to the past work.”  
 15 *Id.* at 845; Social Security Ruling (“SSR”) 82-62.<sup>3</sup> The Dictionary of Occupational Titles  
 16 (“DOT”) is “the best source for how a job is generally performed.” *Carmickle*, 533 F.3d  
 17 at 1166 (citation omitted).

18       The ALJ found that Sterling is capable of performing past relevant work as a care  
 19 provider, as actually performed. AR 17-18. Sterling argues that the DOT describes the  
 20 care provider job as being at the medium exertional level. JS 4-5 (citing DOT  
 21 354.377.014).) However, the ALJ did not find that Sterling was capable of returning to

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23       <sup>2</sup> The ALJ also made a finding that Sterling could perform his past relevant work as  
 24 a laborer. AR 17. However, the ALJ’s discussion under that heading does not mention  
 25 the laborer job. AR 17-18. The court assumes that the reference to a laborer is a  
 typographical error.

26       <sup>3</sup> Social Security rulings do not have the force of law. Nevertheless, they “constitute  
 27 Social Security Administration interpretations of the statute it administers and of its own  
 regulations,” and are given deference “unless they are plainly erroneous or inconsistent  
 28 with the Act or regulations.” *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 his past relevant work as generally performed, but rather as he actually performed it.  
 2 AR 17-18. The ALJ found that Sterling actually performed the care giver job at the light  
 3 level of exertion. AR 18. The VE confirmed that Sterling could not perform the job of  
 4 care giver as generally performed. AR 49.

5 Sterling argues that the DOT job description would require him to perform work  
 6 inconsistent with his RFC.<sup>4</sup> According to Sterling, the DOT job description would  
 7 require frequent gripping, grasping, twisting and turning with both hands, and would  
 8 require him to perform any combination of the following tasks:

9 Changes bed linens, washes and irons patient's laundry, and cleans patient's  
 10 quarters. Purchases, prepares, and serves food for patient and other members  
 11 of family, following special prescribed diets. Assists patients into and out of bed,  
 12 automobile, or wheelchair, to lavatory, and up and down stairs. Assists patient to  
 13 dress, bath, and groom self. Massages patient and applies preparations and  
 14 treatments, such as liniment or alcohol rubs, and heat-lamp stimulation.  
 15 Administers prescribed oral medications under written direction of physician or as  
 16 directed by home care nurse. Accompanies ambulatory patients outside home,  
 17 serving as guide, companion, and aide. Entertains patient, reads aloud, and  
 18 plays cards or other games with patient. Performs variety of miscellaneous  
 19 duties as requested, such as obtaining household supplies and running errands.  
 20 May maintain records of services performed and of apparent condition of patient.  
 21 May visit several households to provide daily health care to patients.

22 (DOT 354.377-014.)

23 Sterling stated that his work as care giver consisted of cooking, cleaning, running  
 24 errands, and helping with bathroom use for his disabled brother. AR 137. In an 8-hour  
 25 workday, Sterling estimated he walked, stood and sat for three hours each, climbed for

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 27       <sup>4</sup> Sterling argues he "may have had accommodations to perform this job at the light  
          level." JS at 6. Sterling does not state that he actually had any accommodations and  
 28 his argument is wholly speculative.

1 one hour, and reached for three hours. *Id.* Sterling testified he stopped doing that work  
 2 because of his neck pain and because he could no longer help his brother. AR 26.

3 Sterling argues his care giver job required frequent reaching and handling,  
 4 whereas the ALJ's RFC limited him to "reach above shoulder level occasionally." AR  
 5 13. The Commissioner defines "occasionally" as "from very little up to one-third of the  
 6 time," i.e., "no more than about 2 hours of an 8-hour workday." SSR 83-10, 1983 WL  
 7 31251 at \*5. "Reaching" is defined as "[e]xtending hand(s) and arm(s) in any direction."  
 8 JS at 12 (citing Selected Characteristics of Occupations Defined in the Revised  
 9 Dictionary of Occupational Titles, Appendix C); SSR 85-15, 1985 WL 56857 at \*7.

10 Sterling described his care giver job as consisting of three hours of reaching,  
 11 which is more than occasional. AR 137. To the extent the Commissioner argues that  
 12 the word "reaching" does not necessarily require overhead reaching, this argument was  
 13 addressed in *Prochaska v. Barnhart*, 454 F.3d 731 (7th Cir. 2006). In *Prochaska*, the  
 14 claimant argued her RFC included a limitation that she could "occasionally reach above  
 15 shoulder level" whereas the job identified by the VE required "reaching" frequently  
 16 under the DOT. *Id.* at 736. The Seventh Circuit concluded that "there is an unresolved  
 17 potential inconsistency in the evidence that should have been resolved." *Id.* "It is not  
 18 clear to us whether the DOT's requirements include reaching above shoulder level, and  
 19 this is exactly the sort of inconsistency the ALJ should have resolved with the expert's  
 20 help." *Id.* *Prochaska's* language was quoted by the Ninth Circuit in *Massachi v. Astrue*,  
 21 486 F.3d 1149, 1153 & n.13 (9th Cir. 2007); see also *Mkhitarian v. Astrue*, 2010 WL  
 22 1752162, \*3 (C.D. Cal. 2010) ("As defined in the [Selected Characteristics of  
 23 Occupations Defined in the Revised Dictionary of Occupational Titles], the plain  
 24 meaning of 'reaching' encompasses above-the-shoulder reaching."). Here, the conflict  
 25 arises between the RFC and the requirements of the care giver job as actually  
 26 performed by Sterling. This matter must be remanded for further proceedings at step  
 27 four and, if appropriate, step five of the sequential analysis.

1 IV.  
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3 **CONCLUSION**  
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5 IT IS HEREBY ORDERED that the Commissioner's decision is reversed and the  
6 matter remanded for further proceedings at step four and, if appropriate, step five of the  
7 sequential analysis.

8 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the  
9 Judgment herein on all parties or their counsel.  
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11 DATED: February 15, 2013  
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15 ALICIA G. ROSENBERG  
16 United States Magistrate Judge  
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